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Mary A. Wagner

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# Canadian Rape Shield Statutes

By MARY A. WAGNER\*  
Member of the Class of 1993

## I. INTRODUCTION

The late seventies and early eighties saw an increasing awareness of the need to protect the rights of victims in criminal prosecutions in both the United States and Canada.<sup>1</sup> Rape cases presented a particular area of concern resulting in the enactment of "rape shield statutes."<sup>2</sup> The debate resulting from the enactment of these laws centers on the tension between ensuring the accused's right to a fair trial and providing protection for the complainant.<sup>3</sup>

In an attempt to balance these conflicting interests, Canada has enacted a number of different statutes. In *R. v. Seaboyer*,<sup>4</sup> and the companion case of *R. v. Gayme*,<sup>5</sup> the Supreme Court of Canada reviewed the constitutionality of the then-existing Canadian rape shield statute. In a seven-to-two decision, the Court declared Canadian

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\* A.B. San Diego State University, 1988.

1. See Constance Backhouse & Lorna Schoenroth, *A Comparative Survey of Canadian and American Rape Law*, 6 CAN.-U.S. L. J. 48 (1983).

2. *Id.* Some controversy surrounds the term "rape shield statute" itself. In *R. v. Seaboyer*, the majority indicates the term is misleading in that the protection afforded by the statute is not against the crime of rape itself but from having the complainant's sexual history introduced at trial. 2 S.C.R. 577, 604 (1991). The dissent, on the other hand, indicates the problem with the term "rape shield statute" is that it implies that the purpose of the statute is to shield victims from cross examination while other, perhaps more important, purposes are involved. *Id.* at 648.

3. See Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 41-72. Debate also surrounds the term used for the person bringing the sexual assault charge. A variety of terms have been used. The dissent in *R. v. Seaboyer* evaluates a number of them and settles on "complainant" as, although harsh, being the least offensive. 2 S.C.R. at 647-48. "Complainant" will be used throughout this Note to describe the woman reporting the sexual assault. *Id.* "Prosecutrix" was rejected by the dissent, as it is the State, not the victim who brings the charges; "alleged victim" was also rejected as it connotes that the person has nothing to complain about. *Id.* As the vast majority, though not all, of the complainants in sexual assault cases are female, feminine nouns and pronouns will be used throughout this Note.

4. 2 S.C.R. 577 (1991).

5. *Id.*

Criminal Code Section 276 unconstitutional while upholding the constitutionality of section 277.<sup>6</sup> A lengthy dissent delivered by Justice L'Heureux-Dube and joined by Justice Gonthier followed the majority opinion.<sup>7</sup>

This Note analyzes the Canadian Supreme Court's decision in *R. v. Seaboyer*. It presents a brief overview of the Canadian legal system, which is followed by a discussion of the evolution of Canada's rape shield statutes. A description of the background facts and procedural history in both the *Seaboyer* and *Gayme* cases follows. This Note also sets out and evaluates the challenges before the court, and the reasoning of both the majority and dissenting opinions.

Before discussing Justice L'Heureux-Dube's dissent, this Note explores dissents in general: first looking at different court systems' approaches to the issuance of separate opinions, and then focusing on the purpose or "role" of dissenting opinions. This discussion may seem out of place in a Note concerning rape shield statutes; indeed, the subject of separate opinions could be explored on its own in another paper. However, general information regarding separate opinions is helpful in understanding Justice L'Heureux-Dube's reasoning in *Seaboyer*. Furthermore, a detailed look at the rhetoric and reasoning employed in judicial opinions though interesting in the abstract, has little practical value unless it is discussed in a particular context such as that used here -- rape shield statutes generally and Justice L'Heureux-Dube's *Seaboyer* dissent specifically. Justice L'Heureux-Dube's *Seaboyer* dissent illustrates how the author of a dissent can use arguments not normally employed in a majority opinion. It also illustrates that in order to be persuasive as a judicial opinion, a dissent must fulfill the less rigid, yet still present, expectations that accompany any judicial opinion.

A call for new legislation began almost immediately after the issuance of the *Seaboyer* decision. The Court handed down its decision in August 1991, and in December 1991 Justice Minister Kim Campbell introduced a bill regarding a new rape shield statute on the floor of Parliament. In June 1992, Parliament adopted a new rape shield statute. This Note evaluates the provisions of this new legislation and concludes that this "new" statute may contain the elements to allow it to withstand constitutional scrutiny.

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6. *Id.*

7. *Id.* at 643.

## II. BACKGROUND

### A. The Canadian Legal System

Canadian law is an interesting mix of common law and civil law influences. The common law system brought by the English settlers predominates and is the governing system in nine of the ten Canadian provinces.<sup>8</sup> However, Quebec, the tenth province, derives some of its law from the French civil system and follows a civil law approach for "private" law and a common law approach for all other areas of law.<sup>9</sup> This distinction, while interesting, does not play a role in the discussion of the rape shield statutes at issue here because the majority of the criminal law in Canada, including the rape shield statute, is federal.<sup>10</sup>

As in the United States, two separate court systems operate in Canada: the federal courts, including the Supreme Court of Canada, and the Provincial Courts.<sup>11</sup> The Supreme Court of Canada hears appeals from both the federal and provincial systems. All of the lower courts are bound by the decisions of the Supreme Court.<sup>12</sup>

The Supreme Court of Canada is made up of nine justices appointed by the Prime Minister. The justices may serve until the age of seventy-five at which time they must retire.<sup>13</sup> In order to prevent the undermining of Quebec's civil law system, three of the nine justices must be from that province.<sup>14</sup> Like the United States Supreme Court, the Supreme Court of Canada now has significant control over its docket.<sup>15</sup> The change to this discretionary system resulted from the

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8. GERALD L. GALL, *THE CANADIAN LEGAL SYSTEM* 38 (1977).

9. *Id.* at 38-39.

10. *Id.* at 58-60.

11. *Id.* at 99.

12. *Id.* at 9, 14. The obvious parallels to the United States federal and state court systems seem almost too apparent to mention.

13. PETER MCCORMICK & IAN GREENE, *JUDGES AND JUDGING* 45 (1990). The tenure of the Canadian Supreme Court Justices, which comes to a mandatory end at the age of 75, differs from the length of service of the United States Supreme Court Justices upon whom no mandatory retirement age is imposed. U.S. CONST. art. III, § 1.

14. MCCORMICK & GREENE, *supra* note 13, at 45.

15. *Id.* at 193-94. Until 1974, the Supreme Court of Canada was required to hear a number of appeals of right, including an appeal from any civil suit where the amount in controversy was greater than \$10,000 and an appeal from any capital criminal case. *Id.* at 193. Now the only appeal of right is from a criminal case where there was a dissent in the Court of Appeal. *Id.* at 194.

overwhelming number of appeals of right which filled the Court's docket.<sup>16</sup>

## B. Evolution of the Rape Shield Statutes

The Canadian laws governing the admissibility of sexual history evidence in rape cases have undergone considerable change over the last two decades. The permissive common law approach was followed for a number of years.<sup>17</sup> However, in the 1970s, the common law approach was revised to restrict the admissibility of sexual history evidence.<sup>18</sup> While the letter of the revised statute prevented the introduction of sexual history evidence, an interpretation of the statute by the Canadian Supreme Court greatly limited the provision.<sup>19</sup> In 1982, Parliament responded by enacting Canadian Criminal Code Sections 276 and 277.<sup>20</sup>

Under the common law approach, which was embodied in Canadian Criminal Code Section 142, evidence of a complainant's sexual history with the accused and others was readily admissible at a rape trial.<sup>21</sup> A defendant could use such evidence to establish the complainant's consent to the act at issue, or to show that she was an unchaste woman.<sup>22</sup> Under section 142, a defendant could introduce evidence of unchasteness to impeach the complainant's credibility as a witness, as it was believed that an unchaste woman was more likely to be untruthful.<sup>23</sup> This evidence was highly prejudicial to the complainant and often gave the impression that the complainant, not the accused, was the one on trial.<sup>24</sup> The trial judge's discretion to exclude prejudicial evidence could somewhat temper the harshness of this approach; for example, the judge could instruct the witness not to answer a particular question on cross examination. Since the information of unchasteness sought on cross examination went to the

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16. *Id.*

17. REPORT OF THE FEDERAL/PROVINCIAL TASK FORCE ON UNIFORM RULES OF EVIDENCE 65 (Uniform Law Conference of Canada ed., 1982) [hereinafter REPORT ON EVIDENCE]; PETER K. McWILLIAMS, CANADIAN CRIMINAL EVIDENCE 301 (1984).

18. McWILLIAMS, *supra* note 17, at 301.

19. *Forsythe v. The Queen*, 2 S.C.R. 268 (1980).

20. Criminal Code, R.S.C., ch. C-46, §§ 276-77 (1985) (§ 276 repealed 1992).

21. REPORT ON EVIDENCE, *supra* note 17, at 65; McWILLIAMS, *supra* note 17, at 301.

22. REPORT ON EVIDENCE, *supra* note 17, at 66; McWILLIAMS, *supra* note 17.

23. REPORT ON EVIDENCE, *supra* note 17, at 67.

24. *Id.*

credibility of the witness, no evidence could be introduced by the defense in response to a refusal to answer.<sup>25</sup>

In 1976, as a result of the prejudicial and discriminatory common law rules, Parliament substantially revised Canadian Criminal Code Section 142.<sup>26</sup> It has been said that rape shield statutes in general, and the revision to section 142 in particular, came about as a reaction to the changing social attitude toward sexual behavior and the increasing political influence of women in the 1970s.<sup>27</sup> The revision to section 142 served two basic purposes: First, it eliminated non-probative evidence, thereby preserving the integrity of the trial.<sup>28</sup> Second, it encouraged the reporting of rape incidents as the witness' privacy received greater protection.<sup>29</sup> These revisions embodied the first effort in Canada to provide some protection to rape victims.<sup>30</sup>

In theory, revised section 142 provided the complainant with more protection than the common law rules.<sup>31</sup> Revised section 142 provided that questions relating to the victim's past sexual conduct could be presented only if reasonable notice had been given to the witness.<sup>32</sup> In addition, an in-camera hearing would be held to determine the relevancy and admissibility of the proffered evidence.<sup>33</sup> The notice provision was designed to prevent the witness and the prosecution from being surprised by the introduction of sexual history evidence as well as to limit the defendant's use of such evidence.<sup>34</sup>

Revised section 142 appeared to provide the necessary protection for the victim, and at the same time allow the defendant the opportunity to present relevant evidence. However, when the courts applied the statute, the level of protection was less than satisfactory.<sup>35</sup> In *For-sythe v. The Queen*,<sup>36</sup> the Canadian Supreme Court's interpretation of revised section 142 allowed the complainant to be compelled as a witness at the in-camera admissibility hearing, a result not available at

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25. *Id.*

26. McWILLIAMS, *supra* note 17, at 301.

27. *Id.*

28. Christine Boyle, *Section 142 of the Criminal Code: A Trojan Horse?*, 23 CRIM. L.Q. 253, 255 (1980).

29. *Id.*

30. McWILLIAMS, *supra* note 17, at 301.

31. REPORT ON EVIDENCE, *supra* note 17, at 71.

32. Criminal Law Amendment Act, ch. 93, 1974-75-76 S.C. (repealed by Criminal Law Amendment Act, ch. C-125, § 19, 1980-81-82-83 S.C.).

33. *Id.*

34. REPORT ON EVIDENCE, *supra* note 17, at 69.

35. *Id.*

36. 2 S.C.R. 268 (1980).

common law.<sup>37</sup> The *Forsythe* decision was highly criticized because it stripped the complainant of the common law privilege to remain silent and made her credibility a material issue.<sup>38</sup>

As a result of the Supreme Court's interpretation of revised section 142 in *Forsythe*, Parliament repealed revised section 142 and enacted Criminal Code sections 246.6 and 246.7 in 1982.<sup>39</sup> These provisions were subsequently renumbered in 1985 as sections 276 and 277, respectively.<sup>40</sup> These are the sections which were at issue in *Seaboyer*.

Canadian Criminal Code Section 276 provided:

[N]o evidence shall be adduced by or on behalf of the accused concerning the sexual activity of the complainant with any person other than the accused unless:

- (a) it is evidence that rebuts evidence of the complainant's sexual activity or absence thereof that was previously adduced by the prosecution;
- (b) it is evidence of specific instances of the complainant's sexual activity tending to establish the identity of the person who had sexual contact with the complainant on the occasion set out in the charge; or
- (c) it is evidence of sexual activity that took place on the same occasion as the sexual activity that forms the subject-matter of the charge, where that evidence relates to the consent that the accused alleges he believed was given by the complainant.<sup>41</sup>

Section 276 followed the "Michigan Model"<sup>42</sup> of rape shield statute because it provided a general prohibition against introducing the complainant's sexual history followed by a number of exceptions. Although the "Michigan Model" statute appears to provide the greatest protection for the complainant, this type of rape shield statute is regarded as the most restrictive and the most objectionable in terms of encroaching on the rights of the accused.<sup>43</sup>

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37. *Id.* at 275-76.

38. REPORT ON EVIDENCE, *supra* note 17, at 72. For an analysis of the *Forsythe* decision, see Boyle, *supra* note 28.

39. Criminal Law Amendment Act, ch. C-125, § 19, 1980-81-82-83 S.C. Not all commentators favored the replacement of section 142. See, e.g., McWILLIAMS, *supra* note 17, at 301, 304.

40. Criminal Code, R.S.C., ch. C-46, §§ 276-277 (1985).

41. *Id.* § 276 (repealed 1992).

42. See MICH. COMP. LAWS § 750.520(j) (1991).

43. See, e.g., J. Alexander Tanford & Anthony J. Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544 (1979-1980); Berger, *supra* note 3.

It is important to note that section 276, struck down in *Seaboyer*, only excluded sexual history evidence of the complainant with "a person other than the accused." Evidence of past sexual conduct between the accused and the complainant was not barred by section 276 and its admissibility was governed by the usual evidentiary standards of relevance.<sup>44</sup> Arguably, with the three general exceptions and the availability of sexual history evidence between the accused and the complainant, section 276 excluded little if any relevant evidence.

Section 276, like revised section 142, required notice prior to the introduction of evidence of the complainant's sexual history, and the court only admitted such evidence after an in-camera hearing.<sup>45</sup> In addition, section 276 specifically overturned the *Forsythe* decision by providing that "the complainant is not a compellable witness" at the in-camera hearing.<sup>46</sup> Thus, Parliament prevented the possibility of an interpretational limitation similar to that given for section 142 in *Forsythe*.<sup>47</sup> It appears that by enacting section 276 Parliament recognized the need to provide greater protection to the complainant in a rape trial.

Canadian Criminal Code Section 277 states: "In sexual assault offenses, evidence of sexual reputation, whether general or specific, is not admissible for the purpose of challenging or supporting the credibility of the complainant."<sup>48</sup> This section expresses Parliament's desire to provide greater protection for the complainant than that available under revised section 142. Under the Court's interpretation of revised section 142 in *Forsythe*, the witness' credibility is always material.<sup>49</sup> Section 277, however, explicitly indicates that evidence of sexual reputation cannot be admitted on the issue of the complainant's credibility as a witness.<sup>50</sup>

### C. *R. v. Seaboyer* and *R. v. Gayme*

Seaboyer and Gayme were charged with sexual assault. Both sought to introduce evidence in their defense of the complainants'

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44. The usual relevancy determination provides that evidence is admissible if its probative value is not substantially outweighed by its prejudicial effects. See, e.g., FED. R. EVID. 403.

45. Criminal Code, R.S.C., ch. C-46, § 276(2), (3) (1985).

46. *Id.*

47. For an evaluation of these provisions, see Boyle, *supra* note 29.

48. Criminal Code, R.S.C., ch. C-46, § 277 (1985).

49. Boyle, *supra* note 28, at 150.

50. Criminal Code, R.S.C., ch. C-46, § 277 (1985).



past sexual conduct.<sup>51</sup> The preliminary inquiry judge who heard the separate cases denied these requests and each defendant appealed the decision.

Seaboyer sought to introduce sexual conduct evidence to rebut evidence presented by the prosecution regarding the complainant's physical condition.<sup>52</sup> Previous sexual encounters, he argued, could provide an explanation for her physical condition, including the bruises which the prosecution introduced as evidence. Seaboyer argued that the complainant's past sexual conduct was relevant to the issue of consent.<sup>53</sup> Therefore, he contended, it was error for the preliminary inquiry judge not to allow the evidence.<sup>54</sup> Seaboyer was not allowed to introduce evidence of the complainant's past sexual conduct on the ground that Criminal Code Sections 276 and 277 completely barred such evidence.<sup>55</sup>

Gayme was charged with sexually assaulting a fifteen-year-old girl, who was his friend.<sup>56</sup> Gayme sought to introduce sexual history evidence to support his defense of consent and an honest belief in consent, as well as his assertion that the complainant was the sexual aggressor.<sup>57</sup> The preliminary inquiry judge did not allow Gayme to introduce evidence of the complainant's past sexual conduct.<sup>58</sup> In addition, Gayme's motion for an order declaring section 276 and section 277 unconstitutional was denied on the ground that the preliminary inquiry judge lacked the jurisdiction to decide the issue.<sup>59</sup> Both the *Seaboyer* and the *Gayme* cases were committed for trial.<sup>60</sup>

The defendants appealed the decisions barring the introduction of sexual conduct evidence to the Supreme Court of Ontario for an order quashing the committal for trial.<sup>61</sup> The defendants argued that they were not given the opportunity to present a complete defense due to the ruling that the sexual conduct evidence was inadmissible.<sup>62</sup> The Supreme Court of Ontario held that both section 276 and section

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51. R. v. Seaboyer, 2 S.C.R. at 598.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 599.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

277 violated the Canadian Charter of Rights and Freedoms.<sup>63</sup> The cases were remanded to the preliminary inquiry judge to allow the evidence to be presented without the restraints of the Criminal Code sections.<sup>64</sup>

The prosecution appealed the decision of the Supreme Court of Ontario to the Ontario Court of Appeal.<sup>65</sup> The Ontario Court of Appeal concluded that the preliminary inquiry judge lacked jurisdiction to determine the constitutionality of sections 276 and 277.<sup>66</sup> Therefore, the court concluded there was no error in the application of these sections.<sup>67</sup> Thus, the order granting the motion to quash was reversed.<sup>68</sup> However, the court went on to indicate that section 276 was unconstitutional, and the court split on the constitutionality of section 277.<sup>69</sup> In dicta, the court indicated that a trial judge should determine whether the application of sections 276 and 277 in a particular case would constitute a breach of the Charter of Rights and Freedoms.<sup>70</sup>

Both Seaboyer and Gayme appealed the decision of the Supreme Court of Ontario to the Supreme Court of Canada challenging the constitutionality of Criminal Code Sections 276 and 277.<sup>71</sup>

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63. *Id.* The Canadian Charter of Rights and Freedoms, part of the Constitution Act of 1981, is similar to the Bill of Rights of the United States Constitution. The Charter, however, is more extensive than the Bill of Rights and has provisions regarding: "Fundamental Freedoms" (section 2); "Democratic Rights" (sections 3-5); "Mobility Rights" (sections 6-10); "Legal Rights" (sections 8-14); "Equality Rights" (section 15); "Official Languages of Canada" (sections 16-22); "Minority Language Educational Rights" (section 23); and "Enforcement" (section 24).

64. *R. v. Seaboyer*, 2 S.C.R. at 599.

65. *Id.* For an analysis of the decision of the Ontario Court of Appeal, see Yola Grant, *The Penetration of the Rape Shield: R v. Seaboyer and R. v. Gayme in the Ontario Court of Appeal*, 3 CAN. J. WOMEN'S L. 592 (1989-1990).

66. *R. v. Seaboyer*, 2 S.C.R. at 599.

67. *Id.*

68. *Id.*

69. *Id.* at 600.

70. *Id.* The view of the Ontario Court of Appeal regarding the application of the doctrine of constitutional exemption was criticized as "reopen[ing] discretionary judicial inquiry into women's sexual conduct, the very process Parliament intended to curb." See Grant, *supra* note 66, at 596. Application of the doctrine of constitutional exemption was considered and rejected by the majority of the Canadian Supreme Court. *R. v. Seaboyer*, 2 S.C.R. at 627-30.

71. *R. v. Seaboyer*, 2 S.C.R. at 607.

### III. THE MAJORITY'S ANALYSIS <sup>72</sup>

#### A. Constitutionality of Section 276

In 1981 the Canadian Parliament adopted the Canadian Charter of Rights and Freedoms. The Charter encompasses many of the same protections that are found in the Bill of Rights of the United States Constitution.<sup>73</sup> It is under the Charter that the Canadian Supreme Court considered the constitutionality of sections 276 and 277.

In the *Seaboyer* decision, the Court first addressed the constitutionality of section 276 under sections 7 and 11(d) of the Charter.<sup>74</sup> Section 7 of the Charter provides: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."<sup>75</sup> Under section 11(d) of the Charter: "Any person charged with an offense has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."<sup>76</sup> The right to a fair trial provided by section 11(d) has been interpreted as part of the fundamental justice provided for in section 7.<sup>77</sup> The two sections are intertwined and are therefore analyzed together.<sup>78</sup>

In determining the constitutionality of section 276, the court looked both to its purpose, defined as the "ultimate aim of the legislation,"<sup>79</sup> and to its effect, defined as the actual consequence of the legislation in general, as well as the consequence to a particular

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72. Justice McLachlin wrote the opinion for the majority and was joined by Justices Lamer, La Forest, Sopinka, Cory, Stevenson, and Iacobucci. *Id.* at 597.

73. *See supra* note 64.

74. *R. v. Seaboyer*, 2 S.C.R. at 602.

75. CAN. CONST. (Canadian Charter of Rights and Freedoms), § 7. This Charter provision resembles the protection of the guarantees of the Fifth and Fourteenth Amendments of the U.S. Constitution that no person will be deprived of life, liberty or property without due process of law. U.S. CONST. amends. V, XIV. The majority's analysis in this decision resembles the due process approach taken by the United States Supreme Court.

76. CAN. CONST. (Canadian Charter of Rights and Freedoms), § 11(d). This is similar to the Sixth Amendment of the U.S. Constitution which provides that: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, to have the compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

77. *R. v. Seaboyer*, 2 S.C.R. at 603.

78. *Id.*

79. *Id.*

defendant.<sup>80</sup> The majority recognized that section 276 served the laudable purpose of replacing prejudicial common law rules.<sup>81</sup> In addition, the majority recognized that the legislation preserved the integrity of the trial, encouraged the reporting of crime, and provided some protection for the witness' privacy.<sup>82</sup> Although the majority recognized these purposes and found them to "conform to our fundamental conceptions of justice,"<sup>83</sup> it determined that the effect of the law infringed on the defendant's right to a fair trial, and this effect overcame these recognized legitimate purposes.<sup>84</sup> The Court disavowed the blanket prohibition of section 276, as it could exclude relevant evidence despite its three broad exceptions.<sup>85</sup> The majority indicated that it should be up to the trial judge to determine the relevancy of the evidence, stating that the trial judge's relevancy determination would provide the complainant with adequate protection.<sup>86</sup>

The majority noted that there were a number of problems with the type of rape shield statute that was at issue.<sup>87</sup> First, the majority argued that "[t]he legislation may misdefine the evil to be addressed as evidence of sexual activity, when in fact the evil to be addressed is the narrower evil of the misuse of evidence for irrelevant and misleading purposes . . . ."<sup>88</sup> Second, the majority argued that the categories set out as exceptions to the prohibition in section 276 cannot take into

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80. *Id.*

81. *Id.* at 604.

82. *Id.*

83. *Id.* at 607.

84. *Id.* at 625.

85. *Id.* at 612. To illustrate the type of evidence potentially excluded by section 276, Justice McLachlin discussed the defense of honest belief in consent where such belief was based on the "sexual acts performed by the complainant at some other time and place." *Id.* at 613. Other examples of "relevant" evidence which could be potentially excluded include: evidence going to the complainant's bias or motivation to fabricate evidence; evidence to rebut evidence introduced by the prosecution of the complainant's physical condition; and use of pattern conduct to infer similar subsequent conduct. *Id.* at 614.

86. *Id.* The court adopted the standard set out in *Sweitzer v. The Queen*, 1 S.C.R. 949, 953 (1982), which said that "admissibility will depend upon the probative effect of the evidence balanced against the prejudice caused to the accused by its admission . . . ." This standard appears to be more restrictive than that followed in most of the United States jurisdictions, which requires relevant evidence to be admitted unless the probative value is substantially outweighed by the possible harm. See, e.g., FED. R. EVID. 403. However, in the discussion following, the majority seems to apply the standard of weighing the probative value against the harm presented.

87. *R. v. Seaboyer*, 2 S.C.R. at 619. The majority indicated that it was adopting the arguments set out by Harriet Galvin in *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763 (1986).

88. *R. v. Seaboyer*, 2 S.C.R. at 618.

account all the possible situations where evidence of the complainant's sexual conduct will be relevant.<sup>89</sup>

The Court's argument justifying the unconstitutionality of section 276 seems to be logical on its face. However, the majority failed to consider the serious problems leading to the original enactment of section 276. Specifically, the majority failed to recognize any potential for prejudice or bias on the part of the judge making the evidentiary ruling. In addition, the majority gave too much credit to the jury's ability to understand that the victim's reputation is not the issue at trial. The majority also failed to consider the desire of the people, manifested through the legislature, to encourage the reporting of sexual assault and to prevent continued victimization at trial.

## B. "Saving" Section 276

### 1. Charter Section 1

Section 1 of the Charter provides that the rights and freedoms set out therein are subject only to such "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."<sup>90</sup> Thus, despite its finding that section 276 was inconsistent with section 7 and section 11(d), the majority could have upheld section 276 under Charter section 1 by finding it to be a "reasonable limitation."<sup>91</sup> In deciding whether section 1 will "save" legislation as being a "reasonable limit, demonstrably justified" it must be shown that:

(a) the objective which the limit is designed to serve is of sufficient importance to warrant overriding a constitutionally protected right; and (b) the means chosen to attain the objective are reasonable and demonstrably justified, in that (1) the measures designed to meet the legislative objective must be rationally connected to the objective, and (2) the means used should impair as little as possible the right or freedom in question, and (3) there must be a proportionality between the effects of the means chosen and the legislative objective.<sup>92</sup>

Although the majority recognized that the legislation addressed a pressing and substantial objective, it determined that the legislation did not impair the accused's rights "as little as possible."<sup>93</sup> Therefore, the majority held that section 276 could not be saved under section 1

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89. *Id.*

90. CAN. CONST. (Canadian Charter of Rights and Freedoms), § 1.

91. *R. v. Seaboyer*, 2 S.C.R. at 580.

92. *Id.* at 702 (citing *R. v. Oakes*, 1 S.C.R. 103, 138-39 (1986)).

93. *Id.* at 626.

of the Charter.<sup>94</sup> This result is not surprising in light of the majority's analysis of the constitutionality of section 276. It was apparent through its traditional approach that the majority would not find that the interests and needs of the complainant "demonstrably justify" a "reasonable limitation" on the rights of the accused.

## 2. Constitutional Exemption

The Ontario Court of Appeal indicated in dicta that the doctrine of constitutional exemption should apply to prevent section 276 from being found facially invalid.<sup>95</sup> Under this doctrine the trial judge would determine if the section, as applied, violated the rights of the particular defendant before the court.

The majority determined that the doctrine of constitutional exemption did not apply and that it would be inappropriate to determine the constitutionality of section 276 on a case-by-case basis.<sup>96</sup> The majority reached this conclusion on the basis that constitutional exemption would not achieve Parliament's purpose for enacting section 276.<sup>97</sup> Additionally, the majority found that allowing a case-by-case determination would cause a return to the common law rules.<sup>98</sup>

## C. Constitutionality of Section 277

Section 277 provides the complainant limited protection by preventing the use of sexual history evidence to impeach her credibility. The majority determined that section 277, unlike section 276, was constitutional.<sup>99</sup> As the purpose of introducing evidence of the victim's sexual history to undermine the victim's credibility is illegitimate, the court held that application of section 277 will not exclude any relevant evidence. Thus, the majority found that section 277 does not infringe upon the defendant's right to a fair trial.<sup>100</sup>

## D. State of the Law

After making these constitutional rulings, the majority proceeded to evaluate the protection afforded complainants in sexual assault

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94. *Id.*

95. *Re Seaboyer*, 61 O.R. 2d 297 (Ont. C.A.) (1987).

96. *R. v. Seaboyer*, 2 S.C.R. at 630.

97. *Id.*

98. *Id.*

99. *Id.* at 625.

100. *Id.*

cases absent the protection of section 276.<sup>101</sup> The court determined that its finding that section 276 was unconstitutional did not revive the common law rules regarding evidence of the victim's past sexual conduct.<sup>102</sup> The majority reached this conclusion on the basis that section 277 still applies to prevent the introduction of inappropriate evidence.<sup>103</sup> In addition to the protection afforded by section 277, the Court found that the trial judge's determinations on relevancy and the danger of allowing the sexual history evidence provide protection from the bias of the common law rules.<sup>104</sup>

The majority established the following guidelines for trial judges in making a relevancy determination:

1. On a trial for a sexual offence, evidence that the complainant has engaged in consensual sexual conduct on other occasions (including past sexual conduct with the accused) is not admissible solely to support the inference that the complainant is by reason of such conduct: (a) more likely to have consented to the sexual conduct at issue in the trial; (b) less worthy of belief as a witness.
2. Evidence of consensual sexual conduct on the part of the complainant may be admissible for purposes other than an inference relating to the consent or credibility of the complainant where it possesses probative value on an issue in the trial and where that probative value is not substantially outweighed by the danger of unfair prejudice flowing from the evidence.<sup>105</sup>

These guidelines ignore that the judges making the determination of relevance and admissibility bring their own bias to their determinations. These "guidelines" are little more than a statement of the ordinary balancing test for relevancy and thus give no real guidance. The overturning of section 276 coupled with the majority's lack of guidance set the stage for the enactment of a new rape shield statute.

#### IV. DECIDING TO DISSENT

Justice L'Heureux-Dube was joined by Justice Gonthier in issuing a lengthy dissent to the decision of the majority in *Seaboyer*.<sup>106</sup> On a purely facial or superficial level, it could be said that issuing a separate opinion, particularly a dissent, serves no purpose. A dissent is not

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101. *Id.* at 630.

102. *Id.*

103. *Id.*

104. *Id.* at 631.

105. *Id.* at 634-35.

106. *Id.* at 643-713.

law: it did not persuade a majority of the court, and it has no precedential value. Therefore, any dissenting opinion could be classified as unsuccessful. However, by going beyond a mere win/loss analysis it becomes apparent that dissents can serve a number of different functions.

### A. Separate Opinions

Choosing to write an opinion separate from that of the majority is a statement in and of itself. Both dissenting and concurring opinions are readily issued and seem to be a matter of course in the United States. However, the same is not true in a number of other countries. In most civil law jurisdictions, such as France, the decision of the court is issued in one anonymous, unanimous decision.<sup>107</sup> Such decisions appear to result from the belief that there is a "right" answer, that the law has one correct meaning.<sup>108</sup> England, on the other hand, follows a tradition of *seriatim* opinions where each member of the court announces his or her own individual judgment.<sup>109</sup> No composite judgment of the court is necessarily issued.<sup>110</sup>

Unlike the *seriatim* tradition of the English, the decision-making process of the Canadian Supreme Court calls for the issuance of an opinion of the court. However, unlike the civil system of France, the Canadian system also permits the issuance of separate opinions. The Canadian Supreme Court's process of decision making and opinion writing is very similar to the process followed by the United States Supreme Court. After hearing oral arguments, the Justices on the Supreme Court of Canada meet to discuss the case.<sup>111</sup> The justices announce their opinions, starting with the most junior justice, and the issues presented are then discussed.<sup>112</sup> After a decision is reached, the most senior justice, typically the Chief Justice, assigns a justice to write

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107. Ruth B. Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 134 (1990).

108. *Id.*

109. *Id.* Ginsburg indicates that there are two exceptions to the usual British approach. These exceptions are in the areas of opinions of the Privy Council and in criminal cases. *Id.* at 135. Permission of the presiding judge is required to issue a separate opinion in a criminal case so as not to exacerbate the "discomfiture of the unsuccessful appellant." *Id.*

110. *Id.* at 134.

111. MCCORMICK & GREENE, *supra* note 13, at 201.

112. *Id.* The debate style practice followed currently in the Supreme Court of Canada is markedly different from the practice in that court ten years ago when the judges announced their own individual decisions. *Id.* at 206. One factor attributed to this change is that three women now sit on the Supreme Court of Canada, and women are thought to tend more toward consensual decision making. *Id.*



the majority opinion.<sup>113</sup> The opinion is written and then circulated to all the justices who then have an opportunity to make comments and suggestions which can be incorporated as the author of the opinion sees fit.<sup>114</sup> The other justices may then decide to write separate concurring or dissenting opinions.<sup>115</sup> One researcher has noted, however, that many justices prefer the Court to issue a unanimous decision.<sup>116</sup> Such a decision is thought to be the clearest and most unambiguous way to indicate the Court's present position and probable future direction.<sup>117</sup>

Some commentators, Learned Hand for example, have argued that the issuance of dissenting opinions diminishes the power of the majority's decision and may even diminish the legitimacy of the Court.<sup>118</sup> However, it seems that this very criticism illustrates the importance and impact of dissents. While it is true that the issuance of dissenting and concurring opinions can lead to confusion, dissents can be a very powerful and persuasive tool, and their existence should not be taken for granted. In jurisdictions where dissenting opinions are issued, they serve a number of different functions.

## B. Role of the Dissent

Justice William J. Brennan has noted that dissents serve a number of functions.<sup>119</sup> One role of dissents is to point out flaws in the majority's reasoning.<sup>120</sup> In a related role, dissents hold the majority "accountable for the rationale and consequences of its decision," and in pointing out the limits of the majority's decision, dissents can provide lower courts and attorneys with ways to distinguish later cases.<sup>121</sup> In Justice Brennan's view, the most important role of federal court dissents is to guide the state courts in interpreting state constitutions differently from the federal constitution.<sup>122</sup> In their most far reaching role, dissents pave the way for future change in the law.<sup>123</sup> In describ-

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113. *Id.* at 201.

114. *Id.* at 201-02.

115. *Id.* at 202.

116. *Id.* at 203.

117. *Id.* at 204.

118. William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 429 (1986) (citing LEARNED HAND, *THE BILL OF RIGHTS* 72 (1958)).

119. *Id.*

120. *Id.* at 430.

121. *Id.*

122. *Id.*

123. *Id.*

ing this later role, Justice Brennan characterizes such opinions as those which "soar with passion and ring with rhetoric . . . [and] at their best, straddle the worlds of literature and law."<sup>124</sup> An additional role of the dissent not mentioned by Justice Brennan is that in writing a dissenting opinion, the author is freed from the constraints that accompany writing an opinion for the majority. Majority opinions are expected to progress in a certain way and to reason in a certain manner, focusing on the issue or case before them. The dissenter is not "making law" and therefore is freed from a number of these expectations. However, the dissenter does not have completely free rein; there are bounds of expectation even for a dissenting opinion. If these boundaries are crossed, the forcefulness or validity of the opinion is lessened and may even be defeated.

Justice Brennan states a number of laudable goals or roles of the dissenting opinion. However, deciding to dissent may also have negative implications. Separate decisions may confuse lower courts and lawyers as to the position of the Supreme Court, thus making them unsure where the Court will go in the future. In addition, separate opinions may cause factions within the court and may lead to difficulty in reaching future decisions. This observation is particularly true of dissents that appear to be a personal attack on the author and members of the majority. In some cases the justices seem to be bickering back and forth. Making these feuds public may lead to a decrease in the perceived legitimacy of the Court.

## V. L'HEUREUX-DUBE'S SEABOYER DISSENT

Justice L'Heureux-Dube joined in the *Seaboyer* majority opinion as to the constitutionality of section 277.<sup>125</sup> However, she dissented strongly from the majority's finding that section 276 violated sections 7 and 11(d) of the Charter.<sup>126</sup> Justice L'Heureux-Dube's dissent illustrates some of the roles of the dissent discussed above. In particular, it demonstrates how the author of a dissent is free from a number of the restraints on the majority.

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124. *Id.* at 431.

125. *R. v. Seaboyer*, 2 S.C.R. at 643.

126. *Id.* at 643 (L'Heureux-Dube, J., dissenting).

## A. The Opinion

Justice L'Heureux-Dube's dissent in *Seaboyer* followed what she termed a "contextual approach."<sup>127</sup> In her view, "the constitutional questions must be examined in their broader political, social and historical context in order to attempt any kind of meaningful analysis of the constitutional questions."<sup>128</sup> The first element of "context" was a discussion of the crime of sexual assault and an examination of a number of discriminatory beliefs, termed "rape myths," regarding women and the crime of sexual assault.<sup>129</sup> Justice L'Heureux-Dube cited a number of studies, reports, and articles to support her assertion that these myths surround the crime of sexual assault. According to Justice L'Heureux-Dube, these myths pervade every step in the process of a sexual assault case: from the decision of the complainant to report the incident, to the determination by the police of whether the complaint is "founded," to the decision of the prosecutor to pursue the claim, to the decisions of a judge and jury in the small number of cases that proceed to trial.<sup>130</sup>

The second element of "context" was a discussion of the "Larger Legal Context."<sup>131</sup> Justice L'Heureux-Dube described the evolution of the evidentiary rules regarding sexual conduct evidence from the

127. *Id.* at 647.

128. *Id.*

129. *Id.* at 648-65. These "rape myths" include:

1. The idea that a woman cannot be raped against her will.
2. The myth that rapists are strangers.
3. Categorization of women as either good or bad.
4. Discrediting the victim and assuming she consented.
5. If a woman is not visibly shaken it is assumed she was not assaulted.
6. The contradictory ideas that an assaulted woman will report the assault immediately or that she will be too ashamed to report it.
7. Women will cry rape as a means of revenge.
8. A woman will consent to sex and then claim she was assaulted because she fears reprisal from a husband or parent.
9. The myth that females make up stories of sexual assault.
10. The myth that rapists are stereotypically violent strangers.

*Id.* at 666-78.

130. *Id.* It is interesting to note that after the *Seaboyer* decision the Crown dropped the cases against both Steven Seaboyer and Nigel Gayme. One reason given for the withdrawal in both cases was the reluctance of the complainant to proceed. When the Crown announced dropping the charges against Gayme, it was stated that the victim did not wish to testify again. See Gary Oakes, *Victim Won't Testify in "Rape Shield" Case*, TORONTO STAR, Nov. 23, 1991, at A10; Gary Oakes, *Sex Charge Dropped in "Rape Shield" Case*, TORONTO STAR, Feb. 19, 1992, at A24; and Gary Oakes, *Crown Withdraws Charges in "Rape Shield" Case*, TORONTO STAR, Feb. 20, 1992, at A2.

131. *R. v. Seaboyer*, 2 S.C.R. at 665 (L'Heureux-Dube, J., dissenting).

common law through the Reform Act of 1982, up to and including section 276.<sup>132</sup> After exploring the various approaches taken regarding sexual history evidence, Justice L'Heureux-Dube discussed "Relevancy and Admissibility at Common Law and Under the Legislative Provisions."<sup>133</sup> She reasoned that "rape myths" pervade any determination of the relevancy of sexual history evidence, as these myths will inform the judge's experience, common sense, and logic.<sup>134</sup> Due to the mythical basis of the relevancy determinations, she argued that most evidence of the complainant's prior sexual history is irrelevant and properly excluded by section 276.<sup>135</sup> In addition, any relevant sexual history evidence would be admissible under the three statutory exceptions to section 276.<sup>136</sup> Even if potentially relevant evidence were excluded, Justice L'Heureux-Dube argued that the value of any such evidence would be substantially outweighed by its dangers.<sup>137</sup> Therefore, in her opinion, section 276 did not violate the Charter's provision of fundamental fairness. In fact, Justice L'Heureux-Dube argued that fundamental fairness requires the opposite result, as fundamental fairness includes not only the rights of the accused, but also takes into account the interests of the complainant and of society in general.<sup>138</sup> These latter interests would be served by the exclusion of irrelevant evidence as the truth-finding goal of the trial would be enhanced.<sup>139</sup>

## B. The Role of L'Heureux-Dube's Dissent

Justice L'Heureux-Dube's dissent satisfies a number of the roles discussed previously. First, though not explicitly, her dissent points out flaws in the reasoning of the majority. Justice L'Heureux-Dube implicitly asserts that the majority failed to recognize the pervasiveness of the rape myths and perhaps even that the reasoning of the majority was influenced by these myths. In so doing, it is possible that this dissent will also serve a negative function by creating a faction or division on the Supreme Court of Canada.

One function of dissents that is clearly illustrated by Justice L'Heureux-Dube's *Seaboyer* dissent is the ability of the dissenter to

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132. *Id.*

133. *Id.* at 679.

134. *Id.* at 679-81.

135. *Id.* at 681-82.

136. *Id.*

137. *Id.* at 690-91.

138. *Id.* at 696-701.

139. *Id.*

reason or argue in ways different from those of the majority. In her discussion of the discriminatory beliefs surrounding sexual assault, Justice L'Heureux-Dube cited no fewer than thirty-two reports, articles, and studies regarding the crime of sexual assault and its effects. The use of social science data is not widely accepted in judicial decision-making.<sup>140</sup> However, one notable use of social science data is seen in Justice Harlan's dissent in *Lochner v. New York*,<sup>141</sup> in which he cited the negative effects long hours and poor working conditions had on the health of bakers. The use of such social science data can be traced through the Court's decision in *Muller v. Oregon*<sup>142</sup> where, influenced by the "Brandeis Brief," the Court sustained a regulation on the working hours of women. Finally, the social science data can be traced in the eventual overturning of *Lochner* in *Bunting v. Oregon*.<sup>143</sup> These cases exemplify a positive function of the dissent in employing alternative reasoning and they illustrate how such reasoning can gain eventual acceptance in a majority opinion.

Justice L'Heureux-Dube's dissent similarly employs social science data. However, Justice L'Heureux-Dube's reasoning is not persuasive. Recognizing the role law plays in society and the effects of societal influences on the law, as was done by Justice L'Heureux-Dube in *Seaboyer*, is an important goal. However, judicial recognition of these considerations must conform to some of the usual restraints on judicial decision-making in order to be persuasive and indeed for the court to be recognized as a legitimate institution. While the restraints on the author of a dissent are less burdensome than those on the author of the majority opinion, they still exist.

Justice L'Heureux-Dube's dissent oversteps one of the few limits placed on the author of a dissenting opinion. In the *Seaboyer* dissent Justice L'Heureux-Dube stepped out of the realm of the judiciary and into the realm of the legislature. Although compelling, the litany of social science data regarding sexual assault and the pervasiveness of rape myths seems better suited to the halls of Parliament. By stepping out of the usual judicial sphere, Justice L'Heureux-Dube lost credibility. Thus, her dissent carries less force, and unfortunately the strength

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140. See, e.g., David L. Faigman, *To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy*, 38 EMORY L.J. 1005, 1008 (1989).

141. 198 U.S. 45 (1905).

142. 208 U.S. 412 (1908).

143. 243 U.S. 426 (1917).

of her argument is greatly diminished.<sup>144</sup> This is not to say that Justice L'Heureux-Dube's dissent will not serve a role similar to that evidenced by the *Lochner* line of cases. If such a role is to be served, it will be due to the enactment of the new Canadian rape shield statute. The information in the preamble to the legislation that was enacted subsequent to the *Seaboyer* decision, discussed in depth in the next section, sounds a great deal like the information discussed by Justice L'Heureux-Dube in her dissent. Arguably, Justice L'Heureux-Dube's opinion influenced Parliament in the enactment of the new legislation. In addition, as such information can now be attributed to Parliament, it may be possible for Justice L'Heureux-Dube's reasoning to carry a majority of the Court in the future.

## VI. POST-SEABOYER LEGISLATION

Almost immediate reactions, both in support and opposition, were seen in response to the decision of the Canadian Supreme Court in *R. v. Seaboyer*.<sup>145</sup> On one hand, people supported the need to protect the rights of the accused; on the other hand, there was an outcry for greater recognition of the rights of the complainant and a call for new legislation.<sup>146</sup> Former Justice Minister Kim Campbell responded to this call by introducing Bill C-49, which became commonly known as the "No Means No Bill," in the House of Commons on December 12, 1991. Just as controversy surrounded the *Seaboyer* decision, Justice Minister Campbell's proposal received a mixed reaction.<sup>147</sup> De-

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144. For a discussion of the necessity of feminist argumentation, see Elizabeth A. Sheehy, *Feminist Argumentation Before the Supreme Court of Canada in R. v. Seaboyer; R. v. Gayme: The Sound of One Hand Clapping*, 18 MELB. U. L. REV. 450 (1991).

145. See, e.g., Martha Shaffer, *Seaboyer v. R.: A Case Comment*, 5 CAN. J. WOMEN & L. 202 (1992). See also, TORONTO STAR, Aug. 23, 1991, at A1, 11; TORONTO STAR, Aug. 24, 1991, at D2; MACLEAN'S, Sept. 2, 1991, at 45.

A Gallup poll taken shortly after the decision in *Seaboyer* indicates that 55% of Canadians polled thought that evidence of the victim's past sexual conduct is irrelevant while 36% believed such behavior was relevant trial evidence. The poll also broke the results down by gender showing that 45% of the males polled thought such evidence would be relevant in a sexual assault trial with only 28% of the females polled joining in that opinion. See *Sex History Irrelevant, Most Say*, TORONTO STAR, Jan. 13, 1992, at A11.

146. Mark Tait, *Rape Law Angers Women*, CALGARY HERALD, Aug. 23, 1991, at A1.

147. See Brian Brennan, *Doubts Raised Over Proposed Rape Law*, CALGARY HERALD, Dec. 19, 1991, at D10; *Rape Shield Law Victimizes the Accused*, THE GAZETTE (Montreal), Dec. 29, 1991, at B3; Michele Landsberg, *Proposed New Rape Law Has Revitalized Feminist Energy*, TORONTO STAR, Mar. 28, 1992, at J1; "No Means No" Draws Attacks, MACLEAN'S, June 1, 1992, § Canada, at 14; Sheila McIntyre, *Bill C-49 Will Protect the Rights of Women*, FIN. POST, June 8, 1992, at S4; A. Kim Campbell, *Justice View*, OTTAWA

spite vocal opposition, Parliament amended the Canadian Criminal Code and passed a "new" rape shield statute on June 23, 1992.<sup>148</sup>

As part of this new legislation, section 273 was added to the Canadian Criminal Code.<sup>149</sup> Section 273.1 provides a definition of "consent" as it is used in other portions of the Code.<sup>150</sup> Section 273.2 goes on to add an important limitation to the defense of consent, not previously present, providing that consent is not a defense where belief in consent results from the accused's "self-induced intoxication" or "reckless or wilful blindness" or if "the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting."<sup>151</sup>

Revised section 276 is the actual "rape shield" provision. It provides:

(1) [E]vidence that the complainant has engaged in sexual activity, *whether with the accused or with any other person*, is not admissible to support an inference that, by reason of the sexual nature of that activity, that complainant

(a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or

(b) is less worthy of belief.

(2) In proceedings in respect of an offence referred to in subsection (1), no evidence shall be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, *whether with the accused or with any other person*, unless the judge, provincial court judge or justice determines, . . . that the evidence

(a) is of specific instances of sexual activity;

(b) is relevant to an issue at trial; and

(c) has *significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice*. (emphasis added).<sup>152</sup>

"New" section 276 contains some important features which distinguish it from its predecessor. First, former section 276, overruled in *Seaboyer* and repealed by the new legislation, only pertained to the

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CITIZEN, June 22, 1992, at A12; Ken Haberman, *Rape Shield Bill Has Horrid Flaws*, FIN. POST, June 22, 1992, at S5.

148. The Canadian Criminal Code was amended by adding sections 273.1 and 273.2 and by repealing section 276 and replacing it with sections 276-276.4.

149. Criminal Code, R.S.C., ch. C-46, § 273.

150. Criminal Code, R.S.C., ch. C-46, § 273.1.

151. Criminal Code, R.S.C., ch. C-46, § 273.2.

152. *Id.* § 276.

exclusion of evidence of "sexual activity of the complainant with a *person other than the accused*" (emphasis added). The new legislation, however, makes its provisions explicitly applicable to previous sexual activity between the accused and the complainant. Arguably, this provision makes new section 276 far more restrictive than its predecessor. However, it does not appear that this distinction will lead to the exclusion of more evidence since "new" section 276 is not a blanket prohibition with a few narrow exceptions as was its predecessor. Instead, "new" section 276 indicates that the trial judge will determine the admissibility of the sexual history evidence. It seems that new section 276 does just what Justice L'Heureux-Dube feared: it leaves the relevancy analysis to the judge and leaves the door open to the influence of prejudicial rape myths. However, the judge will not perform the usual relevancy analysis, which provides that evidence is generally admissible, unless it is shown that its probative value is substantially outweighed by the danger of unfair prejudice. Rather, in the case of sexual history evidence, section 276, subdivision (2) begins with the assumption that such evidence is inadmissible and will only be allowed if the judge determines that the evidence has *significant* probative value which is not outweighed by the "danger of prejudice to the proper administration of justice."<sup>153</sup> In addition to this "stricter" relevancy analysis, section 276(3) goes on to constrain the judge's determination of relevancy by listing a number of specific factors which the judge *shall* consider when deciding upon the admissibility of sexual history evidence.<sup>154</sup> This section provides that:

In determining whether evidence is admissible under subsection (2), the judge . . . shall take into account

- (a) the interests of justice, including the right of the accused to make a full answer and defence;
- (b) society's interest in encouraging the reporting of sexual assault offences;
- (c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;
- (d) the need to remove from the fact-finding process any discriminatory belief of bias;
- (e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;
- (f) the potential prejudice to the complainant's personal dignity and right of privacy;

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153. *Id.* § 276(2)(c).

154. *Id.* § 276(3).



- (g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and
- (h) any other factor that the judge . . . considers relevant.<sup>155</sup>

The provisions of the new Canadian rape shield statute outlined above are the bases for the protection that will now be afforded the complainant in a sexual assault case. However, of particular interest are the provisions of the Preamble to the amendments discussed above. The Preamble provides:

Whereas the Parliament of Canada is gravely concerned about the incidence of sexual violence and abuse in Canadian society and, in particular, the prevalence of sexual assault against women and children;

Whereas the Parliament of Canada recognizes the unique character of the offence of sexual assault and how sexual assault and more particularly, the fear of sexual assault affects the lives of the people of Canada;

Whereas the Parliament of Canada intends to promote and help to ensure the full protection of the rights guaranteed under sections 7 and 15 of the Canadian Charter of Rights and Freedoms;

Whereas the Parliament of Canada wishes to encourage the reporting of incidents of sexual violence or abuse, and to provide for the prosecution of offences within a framework of laws that are consistent with the principles of fundamental justice and that are fair to complainants as well as to accused persons;

Whereas the Supreme Court of Canada has declared the existing section 276 of the Criminal Code to be of no force and effect;

And Whereas the Parliament of Canada believes that at trials of sexual offences, evidence of the complainant's sexual history is rarely relevant and that its admission should be subject to particular scrutiny, bearing in mind the inherently prejudicial character of such evidence . . .<sup>156</sup>

The provisions of the Preamble, along with section 276(3), address a number of the concerns raised by Justice L'Heureux-Dube. As discussed previously, Justice L'Heureux-Dube's *Seaboyer* dissent served a number of roles. Arguably, her dissent also played a role in the fashioning of this new legislation. It seems that a number of the concerns outlined by Justice L'Heureux-Dube were echoed by Parliament in its stated reasons for the enactment of "new" section 276.

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155. *Id.* § 276.

156. *Id.* § 276.

The new rape shield statute appears to be a compromise position between those taken by the majority and the dissent in *Seaboyer*. New section 276 is more restrictive than the state of the law proposed by the majority in *Seaboyer*. Where the majority would have left the admissibility of sexual history evidence to the usual judicial determination of relevancy, new section 276 constrains that decision by imposing a stricter relevancy determination and requiring a number of factors which the judge must consider. On the other hand, new section 276 does not appear to address all the concerns raised by Justice L'Heureux-Dube, although the judge's decision-making is constrained, there is still room for the influence of the rape myths to creep in. What new section 276 does appear to do, however, is to provide the fuel to allow the statute to withstand constitutional scrutiny. As discussed above, Justice L'Heureux-Dube's dissent lost credibility as she seemed to be stepping into the role of the legislature. However, the preamble to new section 276 now raises a number of the same points and attributes them to Parliament's purpose for enacting this law. As such, they can now be cited by the Court and attributed to Parliament, thereby achieving both the purpose of recognizing the influence of the information and maintaining the legitimacy of the Court.

## VII. CONCLUSION

The introduction of a complainant's sexual history as evidence in a sexual assault trial raises questions concerning the rights of the complainant as well as the rights of the defendant to a fair trial. Canada has had a number of approaches to this problem ranging from the common law, where the introduction of such evidence was fairly routine, to the strict "Michigan Model," which the Canadian Supreme Court struck down in *R. v. Seaboyer*. Canada now has a new rape shield statute. As of the writing of this Note, "new" section 276 has not been subjected to a constitutional challenge, but due to the controversy surrounding its enactment, one is almost sure to follow.

It is unclear whether "new" section 276 will withstand such a challenge. One thing is clear: the reasoning and argumentation employed by Justice L'Heureux-Dube in her dissent will now be given greater weight as Parliament has explicitly cited similar reasoning as its purpose for the enactment of "new" section 276. If a constitutional challenge to new section 276 reaches the Canadian Supreme Court, perhaps Justice L'Heureux-Dube will be the author of the majority opinion.

